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EXAMINER

STEPHENS, JACQUELINE F

ART UNIT	PAPER NUMBER
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3761

DATE MAILED: 04/05/2004

9

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

10/024,634

Applicant(s)

FRIDERICH ET AL.

Examiner

Jacqueline F Stephens

Art Unit

3761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 15 January 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1,2,4-19 and 21-25 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,2,4-6,9-12,14-19 and 21-25 is/are rejected.
- 7) ☒ Claim(s) 7, 8, 13 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

## DETAILED ACTION

### *Response to Arguments*

1. Applicant's arguments filed 1/15/04 have been fully considered but they are not persuasive.

As to the rejection of claims 1 and 4 under 102(b) as being anticipated by McCormack, applicant argues McCormack does not teach or suggest that is laminate be used as a containment flap within an absorbent article as required by the present invention. However, regarding the limitations of a liquid impervious material used for a containment flap in an absorbent article, the language is directed to an intended use of the material. Intended use must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963). If the prior art structure is capable of performing the intended use, then it meets the claim limitations. The invention of McCormack meets the structural limitations of claim 1 in that the liquid impervious material is capable of being used as a containment flap in an absorbent article.

As to the rejection of claims 1, 6, 10, 15, 16, and 25 under 35 U.S.C. 102(b) as being anticipated by Buell, applicant argues Buell does not disclose a breathable liquid impervious material including a nonwoven layer. However, Buell incorporates by

reference Hartwell (Buell col. 2, lines 9-19 and col. 6, line 68 through col. 7, line 8) who discloses a laminate material suitable for a backsheet (Hartwell col. 3, lines 28-38).

As to the rejection of claims 2, 7, and 8 under 35 U.S.C. 103(a) as being unpatentable over McCormack, the argument specifically on pages 9-10, is persuasive with respect to claims 7 and 8. Regarding claim 2, see the argument with respect to claim 1 (102 rejection -anticipated by McCormack) above.

Regarding claim 5, in response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). Applicant argues McCormack is unconcerned with preferential extensibility. However, applicant is directed to col. 2, lines 26-49 where McCormack teaches the method of making the film, which involves producing a very thin film by extrusion processing. In order to produce the desired caliper of the film, the film must be extendible. Applicant argues Morman is unconcerned with breathable liquid barrier materials and does not disclose use of a breathable polyether block amide film. However, applicant is directed to col. 1, lines 44-48 where Morman discloses his

invention is concerned with breathable liquid barrier materials. Morman discloses a polyamide polyether copolymer (col. 4, lines 36-40) and incorporates by reference (Morman col. 5, lines 61-66 Killian et al. USPN 4923742 who discloses a polyether block amide film Killian, Abstract).

2. As to claims 9, 11, 12, 17-19, and 21-24 as being rejected under 35 U.S.C. 103(a) as being unpatentable over McCormack in view of Sauer, applicant argues Sauer contains no teaching regarding the containment flaps as per the present claim 9. However, applicant is directed to col. 9, lines 28-41 where Sauer teaches a containment flap of barrier material (polyethylene film) and a nonwoven spunbond material. Applicant is directed to Applicant further reiterates his comments with respect to McCormack. However, in response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., differential extensibility) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

***Claim Rejections - 35 USC § 102***

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

4. Claims 1 and 4 are rejected under 35 U.S.C. 102(b) as being anticipated by McCormack USPN 5855999.

As to claim 1, McCormack discloses a breathable, liquid impervious material. Regarding the limitations of a liquid impervious material used for a containment flap in an absorbent article, the language is directed to an intended use of the material. Intended use must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963). If the prior art structure is capable of performing the intended use, then it meets the claim limitations. McCormack discloses her invention has applicability in absorbent articles where comfort, breathability, and liquid impermeability are desired (col. 1, lines 18-31). Additionally McCormack discloses a laminate of the material can be formed, which is very soft (col. 6, lines 43-45). McCormack discloses the material is a laminate of thermoplastic film and nonwoven facing materials (col. 5, lines 45-55). The combination of liquid impermeability and softness creates a material that is capable of being used as a containment flap in an absorbent article.

As to claim 4, McCormack discloses the nonwoven facing material is a polypropylene spunbond (col. 8, line 66 through col. 9, line 2).

5. Claims 1, 6, 9, 10, 15, 16, and 25 are rejected under 35 U.S.C. 102(b) as being anticipated by Buell USPN 5085654.

As to claims 1 and 9, Buell discloses an absorbent article **10** comprising: an absorbent chassis, the chassis having a longitudinal axis **18** and a containment flap **15**. Buell incorporates by reference Hartwell (Buell col. 2, lines 9-19 and col. 6, line 68 through col. 7, line 8) who discloses a laminate material suitable for a backsheet (Hartwell col. 3, lines 28-38). Buell discloses the containment flap comprises the same material as the backsheet (col. 11, lines 5-7, 43-44, and 51-57). Therefore, Buell discloses a laminate of thermoplastic film and nonwoven facing materials. Buell further discloses the flap has a free edge and an attached edge, the attached edge being attached to the chassis (Figures 1, 3, and 4).

As to claims 6 and 10, Buell discloses the barrier material comprises a microporous film (col. 7, lines 6-8 where Buell incorporates by reference Hartwell who describes a microporous film as a breathable backsheet (Hartwell col. 3, lines 29-31).

As to claim 15, Buell discloses the flap is integral with an outer cover of the article (Figure 4).

As to claim 16, Buell discloses the flap includes elastics within the flap to supply a tensioning force (col. 8, lines 1-33).

As to claim 25, Buell discloses the absorbent article of claim 9, comprises one of a diaper; a training pant; an article of swim wear; an absorbent underpant; an adult incontinence article; a feminine hygiene article; or a medical protective garment (Figure 1).

### ***Claim Rejections - 35 USC § 103***

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

7. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to



consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

8. Claim 2 is rejected under 35 U.S.C. 103(a) as being unpatentable over McCormack.

As to claim 2, McCormack discloses the present invention substantially as claimed. However, McCormack does not specifically disclose WVTR value of greater than about 5,000 gsm/24 hrs. McCormack teaches WVTR rates as high as 4300 g/m<sup>2</sup>/24hours. Additionally, McCormack recognizes the stretching of the film can be varied and this will affect the WVTR (col. 14, lines 11-26). McCormack, therefore recognizes the WVTR is a result effective variable of orientation and degree of stretching of the film. It would have been obvious to one of ordinary skill in the art at the time the invention was made to provide the article of McCormack with the claimed WVTR, since discovering an optimum value of a result effective variable involves only routine skill in the art.

9. Claim 5 is rejected under 35 U.S.C. 103(a) as being unpatentable over McCormack in view of Morman USPN 5226992.

McCormack discloses the present invention substantially as claimed. However, McCormack does not disclose the nonwoven facing material has a basis weight of 0.4

osy. Morman discloses a neckable material having a basis weight of 0.4 osy (col. 6, lines 5-21 and col. 9, lines 1-7) for the benefit of economically producing a disposable product. Morman further discloses the material is necked to about 45% of its original width (col. 9, line 35-41). Morman teaches the relation between the original dimensions of the neckable material to its dimensions after tensioning determine the approximate limits of stretch of the composite elastic necked-bonded material. Morman further teaches the elastic limit of the elastic sheet needs only to be as great as the minimum desired elastic limit of the composite elastic necked-bonded material. Morman, therefore recognizes the elastic limit is a result effective variable of the percentage of necking. It would have been obvious to one of ordinary skill in the art at the time the invention was made to provide the article of McCormack with the claimed percentage of necking, since discovering an optimum value of a result effective variable involves only routine skill in the art, and Morman additionally teaches the necked percentage is desired.

The layer further comprises spunbond substantially continuous polypropylene fibers (McCormack col. 10, lines 63-65).

McCormack discloses the claimed invention except that McCormack discloses polyethylene films instead of polyether block amide film. Morman shows that for the purpose of his invention, polyether block amide film is an equivalent structure known in the art (col. 5, lines 61-66, col. 6, line 55 through col. 7, line 2; and col. 11, lines 43-55). Morman discloses a polyamide polyether copolymer (col. 4, lines 36-40) and incorporates by reference (Morman col. 5, lines 61-66 Killian et al. USPN 4923742

who discloses a polyether block amide film Killian, Abstract). Therefore, because these two were art-recognized equivalents at the time the invention was made, one of ordinary skill in the art would have found it obvious to substitute polyether block amide film for polyethylene film.

Morman/McCormack disclose an elastic sheet having a basis weight of 0.5-10 osy, which includes the claimed range (col. 9, lines 1-2), and can comprise a polyamide film (col. 11, lines 43-55).

10. Claims 9, 11, 12, 14, and 17-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over McCormack in view of Sauer USPN 5938652.

As to claim 9, McCormack discloses an absorbent article comprising an absorbent chassis, which inherently has a longitudinal axis (col. 10, lines 43-52). McCormack discloses her invention is suitable for use as a topsheet or backsheet in an absorbent article (col. 10, lines 43-52). However, McCormack does not additionally disclose a containment flap. Sauer discloses a containment flap comprising a laminate or breathable, microporous film (col. 9, lines 28-41), which can be formed from an extension of the topsheet or backsheet (col. 9, lines 1-2) for the benefit of better containment of body exudates and, in particular, runny fecal material (col. 3, lines 31-34). It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the absorbent article of McCormack to include containment flaps for the benefits disclosed in Sauer.

As to claim 11, McCormack/Sauer discloses the containment flap comprises a transversely extendible film (Sauer col. 3, lines 18-22).

As to claims 12 and 14, McCormack/Sauer discloses the containment flap has a long axis and a transverse axis, the long axis being parallel to the longitudinal axis of the chassis, the flap having a tensioning force in its long axis in that it is well known in the art that a stretch-bonded laminate, such as described in McCormack, provides an elastic property in at least the longitudinal direction, and generally in the lateral direction as well. McCormack/Sauer further disclose the flap has a low modulus of elasticity in its transverse axis and being extendible in its transverse axis - see col. 10, lines 2-38 where Sauer discloses it is desirable for the containment flap to be less extensible in the transverse direction to provide a more optimum fit and seal about the front abdominal region of a wearer.

As to claim 17, McCormack/Sauer discloses the transversely extendible film is a microporous film of about 10 to about 68 weight percent predominately linear polyolefin polymer about 2 to about 20 weight percent of a bonding agent, and about 30 to about 80 weight percent particulate filler (McCormack col. 3, lines 55-62).

As to claim 18, McCormack/Sauer discloses the polyolefin polymer is a linear low density polyethylene (McCormack col. 4, lines 3-6 and col. 5, lines 14-17).

As to claim 19, McCormack/Sauer discloses the microporous film comprises a filler and first and second polymers, the first polymer being a blend of ethylene and propylene (McCormack col. 4, lines 5-6 and col. 6, lines 24-31).

As to claim 21, McCormack/Sauer discloses the spunbond material is a polyolefin (McCormack col. 9, lines 1-2).

As to claim 22, McCormack/Sauer discloses the spunbond material is polypropylene (McCormack col. 9, lines 1-6).

As to claim 23, McCormack/Sauer discloses the flap comprises crimped nonwoven/extensible film laminates (McCormack col. 9, lines 7-15 describes crimped fibers constituting the nonwoven material. McCormack col. 4, lines 3-29 and col. 9, lines 50-61 disclose the film is extendible).

As to claim 24, McCormack/Sauer discloses the film comprises a stretched microporous film (McCormack col. 4, lines 12-19 and Sauer col. 9, lines 39-41 and col. 13, line 50 through col. 14, line 24).

***Allowable Subject Matter***

11. Claims 7, 8, and 13 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

***Conclusion***

12. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jacqueline F Stephens whose telephone number is (703) 308-8320. The examiner can normally be reached on Monday-Friday 9:00-5:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, John Calvert can be reached on (703)305-1025. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Jacqueline F Stephens  
Examiner  
Art Unit 3761



March 29, 2004



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